the Act, on its face, violates their rights under the First Amendment. Apparently believing a law is "content based" even if it merely requires the identification of speakers to determine its application, the district court treated the Act as content based because it prohibits solicitations by charities' contract telemarketers but not by their employees and volunteers. Pet. App. 20a. Applying strict scrutiny, the district court concluded the Act serves a compelling governmental interest, but found it not "narrowly drawn" because it does not apply to *all* charitable solicitations. Pet. App. 21a, 22a. Accordingly, the district court found the Act unconstitutional to the extent its restrictions apply to charitable speech. Pet. App. 26a. Although no commercial speakers are plaintiffs in this case, the district court also reviewed the Act under the commercial speech doctrine and found it to be entirely valid under that test. Pet. App. 16a-20a, 26a.

The Eighth Circuit reversed. Observing that professional charitable solicitation is fully protected speech, the Court of Appeals, citing *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), stated "[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys." Pet. App. 3a. Further, correcting the district court, the decision also noted that "[r]egulation of expressive activity is content neutral if it is justified without reference to the content of the regulated speech." Pet. App. 3a. Applying these principles to the statute, the Eighth Circuit found "it is evident the Act is content neutral." Pet. App. 3a. It wrote:

> First, North Dakota has not distinguished between professional and in-house charitable solicitors because of any disagreement with the message that would be

> conveyed, for the message would be identical regardless of who conveyed it. Second, the regulation can be justified without reference to the content of the regulated speech, for North Dakota's interest is in protecting residential privacy.

Pet. App. 3a.

Finding the Act content neutral, the Eighth Circuit applied the test derived from *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), considering: "(a) whether the State had a sufficient or 'legitimate' interest; (b) whether the interest identified was 'significantly furthered' by a narrowly tailored regulation; and (c) whether the regulation substantially limited charitable solicitations." Pet. App. 4a. Like the district court, the Eighth Circuit held residential privacy is a "significant" government interest, and "[t]he rationale underlying the North Dakota regulation falls within this significant interest." Pet. App. 4a-5a. It also ruled the Act is narrowly tailored because "North Dakota's goal of ensuring residential privacy would be achieved less effectively if the legislature exempted professional charitable solicitors from the Act." Pet. App. 5a. Furthermore, the Eighth Circuit ruled, because the Act applies only to personal residences and contains a content neutral and viewpoint neutral opt-in provision, it "does not burden more speech than is necessary to further the State's interest in residential privacy." Pet. App. 7a.

Although he agreed "North Dakota has a legitimate interest in preserving residential privacy," and that "the Act serves a sufficiently strong, subordinating interest that the state is entitled to protect," Judge Heaney dissented from the majority opinion because he did not believe the Act is narrowly tailored. Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

Petitioners have failed to identify any grounds warranting a grant of certiorari in this case. First, this case does not present the issue asserted by petitioners because the Act in no way represents an "extension of the national do-not-call registry." Pet. (i). Instead, the Act sets forth its own substantive provisions that do not depend on federal law for content. Accordingly, the case presents no inconsistency between the Act and any national no-call programs enforced by the FCC and the FTC. Furthermore, Petitioners never before asserted such a quasi-preemption claim in this case, and the decision below certainly does not purport to address it. Perforce, there is no conflict between the Eighth Circuit decision and the decisions from the Fourth and Tenth Circuits concerning the FCC and FTC programs.

Second, the decision below does not conflict with any decisions of this Court. To the contrary, the Eighth Circuit scrupulously followed and correctly applied this Court's First Amendment precedents in upholding the Act, which, after all, merely gives force to individual consumer preferences not to be disturbed in the privacy of their own homes.

I. Petitioners mischaracterize the decision below in an effort to generate a more interesting issue for review and to manufacture a material conflict with other circuits.

In a rather obvious attempt to attract more attention to their cause and to create an intra-circuit conflict where none exists, in their question presented, Petitioners grossly misrepresent the underlying issues in this case. In short, there is no purported "extension of the national do-not-call registry" at stake, only an independent state substantive no-

call law that, in compliance with federal mandates, protects all North Dakota citizens who have also sought the protection of federal no-call laws. Furthermore, Petitioners have never before asserted this issue.

A. The Eighth Circuit did not extend the national do-not-call registry.

Neither the Act nor the decision below extends any national do-not-call laws to charitable speech. To understand why this is so, it is important to understand the basic structure of the federal and state no-call laws.

Congress has separately authorized the FCC and the FTC to enforce telemarketing restrictions, and those agencies have promulgated separate rules to do so. *See* 15 U.S.C. §§ 6101, *et seq.*; 16 C.F.R. §§ 310.1, *et seq.*; 47 C.F.R. §§ 64.1200, *et seq.* These rules have, for present purposes, two components. The first is substantive. The FCC's rule prohibits most commercial sales calls to registered consumers. *See* 47 C.F.R. § 64.1200(c)(2). The FCC lacks statutory jurisdiction, however, over some entities that make telemarketing calls, including charities and those calling on their behalf. *See, e.g.*, 47 C.F.R. § 64.1200(f)(9)(iii). Due to its general jurisdiction over professional telemarketers, the FTC's rule covers many entities outside the FCC's jurisdiction. *See* 15 U.S.C. §§ 6102(a), 6106(4); 16 C.F.R. §§ 310.2(u), (bb), (cc); 68 Fed. Reg. 4580-01, 4585 (Jan. 29, 2003); *National Fed'n of the Blind v. Federal Trade Commission*, 420 F.3d 331, 334-36 (4th Cir. 2005), *pet. for cert. filed*, 74 U.S.L.W. 3438 (U.S. Jan. 23, 2006) (No. 05-927) (discussing FTC jurisdiction). For its part, however, the FTC has decided that telemarketers calling on behalf of charities need only to maintain charity-specific no-call lists

rather than refrain from calling all registered consumers. 16 C.F.R. §§ 310.4(b)(1)(iii)(A), 310.6(a).

The second component of the FCC and FTC no-call rules is the registry shared by those agencies. Congress requires the FCC and FTC enforce their respective rules with respect to a single national no-call registry, meaning consumers who register for the protections from one agency automatically receive the protections of both. 47 U.S.C. § 227(c)(3); 16 C.F.R. § 310.4(b)(1)(iii)(3); 18 F.C.C.R. 14014, 14017 (June 26, 2003). By doing this, consumers need not register multiple times with the federal government.

Congress has also enacted a provision requiring states that enforce their own registry-based no-call laws to include on their registries state residents who have registered for federal protection. 47 U.S.C. § 227(e)(2). So, for example, North Dakota must enforce its own no-call law to protect North Dakota residents who have registered for federal protection, even if those residents have not separately registered for state protection with the North Dakota Attorney General. For the sake of efficiency, North Dakota does not maintain a separate state registry; it merely enforces its substantive no-call law for the benefit of North Dakota residents who have registered for the federal list, *as it is required to do by federal law*. (In addition to requiring states to include the federal do-not-call list in their own registries, Congress stated that the FCC database "shall . . . be designed to enable States to use the [database] . . . for purposes of administering or enforcing state law." 47 U.S.C. § 227(c)(3)(J)).

Petitioners mischaracterize this legislative framework as being the equivalent of stretching the substantive federal no-call laws to cover charities, but this is plainly not the case. It is true that neither the FCC nor the FTC prohibits

telemarketing calls on behalf of charities to all federally-registered telephone subscribers.[3] But neither do they prohibit states from enforcing their own substantive laws prohibiting such calls. Indeed, because Congress has not authorized the FCC to regulate charitable solicitations, the FCC lacks jurisdiction to preempt the states in this area. *See National Coalition of Prayer, Ir v. Carter*, No. 02-0536-C, 2005 WL 2253601, at *15-16 (S.D. Ind. Sept. 2, 2005). And for its part, the FTC has expressly *disclaimed* any intent to preempt states when it comes to regulating charitable solicitations. 68 Fed. Reg. 4580-01, 4638 n.696 (Jan. 29, 2003).[4] So, that leaves North Dakota in the entirely unremarkable position of enforcing its own law for the benefit of self-selected North Dakota residents. That self-selection happens by North Dakota residents registering on the national do-not-call registry.

Accordingly, Petitioners' assertion the decision below conflicts with decisions from the Tenth and Fourth Circuits concerning the substantive FCC and FTC no-call regulations

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[3] Petitioners' assertion the FTC exempted charitable telephone solicitations for the national no-call registry due to First Amendment concerns is inaccurate. Pet. 12. To the contrary, the FTC specifically noted the future possibility of requiring "telemarketing calls soliciting charitable donations to comply with the national 'do-not-call' registry requirements." 68 Fed. Reg. 4580-01, 4637.

[4] For these reasons, Petitioners' assertion that "[d]eference should be given to the FTC's exemption of charitable calls from the national do-not-call registry" is misguided. Pet. 12. Whether or not deference is owed to an agency's assertion of preemptive authority, agency deference has no bearing on the First Amendment challenge before the Eighth Circuit.

is utterly implausible. *Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004), upheld the constitutionality of the FCC's commercial sales no-call law. Because the FCC no-call law only applies to commercial speech, the decision applied the *Central Hudson* analysis. The Tenth Circuit decision says nothing about no-call laws that apply to charitable solicitations. In contrast, because the challenged Act applies to both commercial and non-commercial speech, the Eighth Circuit applied the analysis directed by this Court in *Schaumburg*. Pet. App. 4a. Hence, the issues addressed, and tests applied, by the Tenth and Eighth Circuits are materially different. The Tenth Circuit's own opinion makes it clear the court was not holding a no-call law had to apply only to commercial speech to be constitutional. It wrote: "We express no opinion as to whether the do-not-call registry would be constitutional if it applied to political or charitable callers." *Id.* at 1233 n.2.

Petitioners' attempt to manufacturer a split with the Fourth Circuit's decision in *National Fed'n of the Blind* is likewise futile. In *National Fed'n of the Blind*, the Fourth Circuit, in an opinion by Judge Wilkinson, upheld the FTC's requirements that charities using professional fundraisers comply with a charity-specific do-not-call list. The decision did not address either the substantive validity of more general no-call laws applicable to charitable solicitations or the preemptive effect of the FTC's rule. Indeed, not only is the lower court's decision consistent with the Fourth Circuit's decision in *National Fed'n of the Blind*, it partially relied upon it. *See* Pet. App. 6a. Furthermore, consistent with the Eighth Circuit's decision, *see* Pet. App. 4a, the Fourth Circuit applied *Schaumburg* and its progeny because the charity-specific do-not-call list applies to non-commercial speech, *see* 420 F.3d at 338. The purported split does not exist.

Although the Eighth Circuit partially relied on the *National Fed'n of the Blind* decision, that reliance did not include the Fourth Circuit's "limited jurisdiction" analysis. As is evident from a plain reading of its decision, the Eighth Circuit quoted *National Fed'n of the Blind* for the Fourth Circuit's analysis of balancing the rights of charities to communicate with potential donors and the potential donors' right to enjoy residential peace, a legitimate and substantial concern. Pet. App. 6a. Because the Eighth Circuit did not adopt or rely on the "limited jurisdiction" rule, Petitioners' lengthy diatribe on this issue is a red herring, designed to create an issue for review. Pet. 21-22.

In short, the decision below in no way addresses federal regulation of charitable solicitations; it does not address or impact the authority of the FTC and the FCC. Instead it is limited to the constitutionality of a state do-not-call law that applies to both commercial and non-commercial calls. Respondent is aware of only one other decision addressing the constitutionality of such a law. In that decision, a United States District Court upheld Indiana's do-not-call statute. *See Carter*, 2005 WL 2253601, at *16. Like North Dakota's Act, Indiana's statute does not apply to telephone calls made by volunteers or employees of a charitable organization. Ind. Code 24-4.7-2-7. And, like the Eighth Circuit, the Indiana federal district court found the exemption constitutional. *Carter*, 2005 WL 2253601, at *16. Thus, the Eighth Circuit's decision is consistent with the only other decision directly on point.

B. The issue stated in Petitioners' Question Presented was never raised below.

Regardless of how they characterize the Act vis-à-vis the national no-call registry, the fact remains Petitioners never

raised this issue, which, after all, sounds more in preemption than in free speech. The Eighth Circuit was *not* called upon to interpret the provisions of, or address the constitutionality of, the national do-not-call registry or to consider whether those provisions somehow prevent North Dakota from enforcing its own no-call law. As plainly indicated in the complaint, and as addressed by both the district court and the Eighth Circuit, this case is limited to a facial First Amendment challenge of N.D. Cent. Code ch. 51-28. At no time did Petitioners allege below that the Act conflicted with, or impermissibly extended, the national do-not-call registry. And the lower court in no way addressed application of the national do-not-call registry and its regulations. Petitioners may not raise this issue for the first time here. And, even if they could, the lack of any substantive decision below renders this case a poor vehicle for addressing the issue. *See Clingman v. Beaver*, 544 U.S. 581, 125 S. Ct. 2029, 2041 (2005); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004).

II. The decision below does not conflict with any decision of this Court.

For decades it has been well-settled law that charitable solicitations are within the protections of the First Amendment. *See Schaumburg*, 444 U.S. 620 and cases cited therein. The Eighth Circuit properly applied that law, finding "professional charitable solicitation is fully protected speech." Pet. App. 2a. Equally well established is the principle that the government may regulate the time, place, or manner of expressive activity, even charitable speech, so long as the restrictions are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communications. *See, e.g.*, *Ward*, 491 U.S. at 791; *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487

U.S. 7[illegible]802 (1988); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981). The lower decision represents a straight-forward application of this black letter law.

A. The Eighth Circuit did not subject the Act to "lesser scrutiny," but instead properly deemed the Act to be content neutral.

The Eighth Circuit, consistent with this Court's jurisprudence, recognized charitable speech is afforded higher protection than commercial speech. It specifically held "professional charitable solicitation is fully protected speech." Pet. App. 2a. Contrary to Petitioners' assertion, the lower court did not subject the Act to "lesser scrutiny." What Petitioners actually challenge is the Eighth Circuit's application of the well-established time, place, and manner doctrine. But a mere alleged misapplication of law does not ordinarily warrant review by this Court. Furthermore, the Eighth Circuit did not misapply this Court's jurisprudence. To the contrary, it scrupulously adhered to it.

The decision below did not deviate from this Court's cases in determining the Act to be content neutral. As stated in *Ward*, 491 U.S. at 791, "[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys." Pet. App. 3a. Quoting *Ward*, 491 U.S. at 791, the Eighth Circuit explained that "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" Pet. App. 3a. *See also Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643 (1994) ("Laws that confer benefits or impose burdens on speech without

reference to the ideas or views expressed are in most instances content neutral.").

Petitioners' assertion the Act is not content neutral is primarily based on the Act's exception permitting charities to use volunteers or employees, but not contract telemarketers, to make calls to residents who have registered their residential telephone numbers. But this exception makes no distinction based on the content of solicitations. It also applies irrespective of viewpoint or mission, and is justified for reasons unrelated to the content of the speech. The Eighth Circuit's analysis on this issue is fully consistent with this Court's First Amendment precedent.

The distinction between charitable solicitations by employees and volunteers versus professional telemarketers is not content based. It is based upon sheer volume. A charity using professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees. Because professional telemarketers typically earn a percentage of each donation, they also have a direct financial incentive to dial as many residential telephone numbers as possible; charities' volunteers and employees typically do not have these same incentives. Thus, this distinction is justified by the volume of invasive calls, which is directly related to the purpose of the Act, not content. *See Carter*, 2005 WL 2253601, at *13 (discussing Indiana's legislative finding that professional telemarketers "are likely to resort to more aggressive tactics, make calls when residents least desire them, draw on their expertise in overcoming residents' attempts to terminate the calls, and make as many solicitation calls as possible in a given time-frame"). The exception applies equally, irrespective of message or viewpoint of the caller.

This exception also represents a balance drawn by the Legislature between the interests of charities and the privacy interests of residential telephone subscribers. Though the Act could lawfully have banned all calls by charities to registered subscribers, the Legislature instead sought only to significantly curb such calls by limiting, but not completely eliminating, charities' intrusions into homes that prefer privacy. Such action is appropriate because it significantly furthers residential privacy. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) ("Nor do we require that the Government make progress on every front before it can make progress on any front."); *see also National Fed'n of the Blind,* 420 F.3d at 349; *Moser v. F.C.C.*, 46 F.3d 970, 974-75 (9th Cir. 1995) ("Congress may reduce the volume of intrusive telemarketing calls without completely eliminating the calls."). By permitting calls from charities' volunteers and employees only, the Legislature knew registered telephone subscribers would significantly reduce the chances of being inundated with calls. *See Carter*, 2005 WL 2253601, at *8.

Far from being "baffling," Pet. 16, the Eighth Circuit's determination the Act is content neutral is based upon and in accordance with this Court's precedent. It is also consistent with the only other decision directly on point. *See Carter*, 2005 WL 2253601, at *16.

B. The Eighth Circuit's time, place, and manner analysis falls squarely within this Court's precedents.

A content neutral regulation may regulate the time, place, or manner of expressive activity if the restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternatives for communications.

Ward, 491 U.S. at 791. The decision below properly applied this well-established First Amendment principle.

1. The Act serves a significant governmental interest.

The Act's chief aim is to protect residential privacy from being disturbed by unwanted telemarketing calls, including those made by professional telemarketers on behalf of charities. Residential privacy is a significant, indeed compelling, governmental interest, as this Court has frequently concluded. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."). The listener's interest in avoiding unwanted speech is at its greatest where the speech threatens residential privacy. *See Hill v. Colorado*, 530 U.S. 703, 717 (2000) (stating "[t]he right to avoid unwelcome speech has special force in the privacy of the home"); *Frisby*, 487 U.S. at 484-85 (acknowledging the "unique nature of the home" and that, "[a]lthough in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different"; "individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); "There simply is no right to force speech into the home of an unwilling listener."); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) ("categorically reject[ing] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another"); *National Fed'n of the Blind of Ark, Inc. v. Pryor*,

258 F.3d 851, 855 (8th Cir. 2001) (stating "*Rowan* confirms that the State has a legitimate governmental interest in adopting reasonable restrictions to protect its citizens from unwanted telephone calls to their homes").

In the context of telemarketing regulations, lower state and federal courts have, like the decision below, consistently deemed residential privacy to be a sufficiently strong subordinating justification to support content neutral speech restrictions. *See, e.g.*, *National Fed'n of the Blind*, 420 F.3d at 339-40; *Bland v. Fessler*, 88 F.3d 729, 734 (9th Cir. 1996) (stating the government's "significant interest in protecting residential privacy is well established"); *Mainstream Mktg.*, 358 F.3d at 1238-39 (finding protecting residential privacy to be a substantial governmental interest); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995) (holding "[r]esidential privacy is a significant government interest."); *Carter*, 2005 WL 2253601, at *9 (holding the Indiana Telephone Privacy Act, which is designed to protect the residential privacy of individual telephone subscribers, "clearly passes the threshold test as advancing a significant governmental interest"); *State by Humphrey v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 888 (Minn. 1992) (finding state has a substantial interest in protecting privacy in the home).

Furthermore, that residential privacy is "significantly furthered" by the Act is beyond cavil. If the subscriber takes the appropriate affirmative action, the Act eliminates many intrusive, offensive, and unwanted telephone solicitations. Petitioners assert that no data in the record shows the Act actually reduces the number of intrusive telephone calls into private residences. Petitioners' argument, which was not made to the Eighth Circuit, ignores that the North Dakota Legislature could properly rely on factual findings of other

entities, such as the courts,[5] federal agencies, and other states,[6] as well as common sense.

By way of example, in 1991 Congress concluded "telemarketing calls to homes constituted an unwarranted intrusion upon privacy." *Moser*, 46 F.3d at 972. After receiving approximately 64,000 comments and holding a

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[5] *See* Pryor, 258 F.3d at 856 ("Our own experience suggests that most households in today's society are plagued by a flood of unwanted telephone solicitations."); *Van Bergen*, 59 F.3d at 1555 ("The sheer quantity of telemarketing calls further supports the government's interest in regulation protecting privacy. . . . Telemarketing calls . . . are flourishing, and becoming a recurring nuisance by virtue of their quantity."); *id.* at 1554 (the disruption caused by such calls is "evident to anyone who has received such unsolicited calls when busy with other activities."); *Humphrey*, 491 N.W.2d at 888 (explaining "the residential telephone is uniquely intrusive" and "for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury"); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1107 (N.J. Super. Ct. Law Div. 1995) (stating consumers are frustrated because there appears to be no way to prevent these calls).

[6] *See Carter*, 2005 WL 2253601, at *8, 13 (refers to legislative findings "that the inundation of calls by professional telemarketers, irrespective of any specific message, is intrusive and unwelcome in terms of residential privacy interests," and that professional telemarketers "are likely to resort to more aggressive tactics, make calls when residents least desire them, draw on their expertise in overcoming residents' attempts to terminate the calls, and make as many solicitation calls as possible in a given time-frame"); *id.* at *12 (stating "the undisputed evidence demonstrates that the [Indiana] Act's general prohibitions have already dramatically reduced the burden placed on residents from the inundation of unwanted telemarketing calls.").

three-day public forum, the FTC concluded that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." 68 Fed. Reg. 4580-01, 4637. *See also* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394§§ (finding "[m]any customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers"); *id.* (finding telemarketing to be "a risk to public safety" when "an emergency or medical assistance telephone line is seized.").

More recently, during the FTC's hearings leading up to the Proposed Rule, consumer commentators unanimously testified that they dislike the intrusiveness and inconvenience of telemarketing and that they wanted to be free of these calls. Telemarketing Sales Rule, Proposed Rule, 67 Fed. Reg. 4492-01, 4518 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310). The FTC also received studies showing that consumers rate telemarketing calls at the top of the scale of consumer nuisances. *Id.* at 4518 nn.246-47 (citing a study submitted by the National Consumer League showing 49% of respondents give telemarketing the highest rank of everyday experiences that bother them and a 1999 poll conducted by the State of Kentucky showing 80% of respondents found telemarketing calls to be annoying and intrusive).

2. The Act is narrowly tailored.

This Court has held the location to which a regulation applies is a significant factor to be considered not only in determining the strength of the government interest, but also in determining whether the regulation is reasonable and narrowly tailored. *See Hill*, 530 U.S. at 724, 728. The element of private choice is also a significant factor in this determination. The seminal case on this point is *Rowan*,

where this Court upheld an opt-in do-not-mail list system. Under the challenged statute, the Postmaster could issue an order directing the sender of offensive mail to refrain from further mailings upon request from the addressee. 397 U.S. at 730. As explained by the Court, "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* at 737. The statute's element of private choice, coupled with the government's interest in protecting residential privacy, proved dispositive. "Congress," the Court explained, "has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence." *Id.* at 738. *See also National Fed'n of the Blind,* 420 F.3d at 342 (stating "[i]f consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace"); *Mainstream Mktg.*, 358 F.3d at 1242 (stating "[t]he Supreme Court has repeatedly held that speech restrictions based on private choice (i.e.,--an opt-in feature) are less restrictive than laws that prohibit such speech directly."); *Bland,* 88 F.3d at 733 (upholding prohibition of automatic-dialing and announcing devices except with householder consent, explaining the statute made "no decisions for the called parties who remain free to decide for themselves whether or not to listen to prerecorded messages"); *Carter*, 2005 WL 2253601, at *10.

Based upon this precedent, the Eighth Circuit properly found the Act, which applies to residential subscribers only and permits individual subscribers to decide whether to prohibit calls, is narrowly tailored. Due to the opt-in nature of the Act, the Act eliminates only those phone calls that citizens themselves expressly do not want to receive. Individual subscribers, not the government, decide whether

and which calls are unwanted and disrupt residential privacy. The Act implements each subscriber's decision, and leaves room for the subscriber to modify what calls are banned so only unwanted calls are eliminated. If registered subscribers wish to receive any calls defined as a "telephone solicitation," they can give their consent or permission for a caller to make the telephone solicitation. *See* N.D. Cent. Code § 51-28-01(7)(a), Pet. App. 28a. Thus, the Act is the embodiment of counsel given in *Martin v. City of Struthers*, 319 U.S. 141 (1943), where this Court indicated that a statute that makes it an offense to "ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed" is acceptable because the statute "leaves the decision . . . where it belongs--with the homeowner." *Id.* at 148. The Act permits telephone subscribers to "appropriately indicate" they are "unwilling to be disturbed." Subscribers have the right to do so. *Rowan*, 397 U.S. at 737 ("The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property.").

3. The Act leaves open ample alternatives for communication.

The Eighth Circuit's conclusion the Act leaves open ample alternative channels of communication is also in accord with this Court's precedent. The lower court noted the Act only "prohibits calls to the homes of residents who have chosen not to receive calls from professional charitable solicitors." Pet. App. 8a. Unless consumers take the affirmative act of registering their residential telephone number, charities remain free to use the telephone to contact North Dakota consumers. And even if that affirmative action is taken, employees or volunteers of charities may still solicit funds. Pet. App. 8a. Further, charities and non-charities are free to communicate their message to residents in person (door-to-

door, on the street corner, from booths, *etc.*), by mail, through newspapers, magazines, leaflets, the yellow pages, billboards, posters and signs, and over the radio, television and Internet. Pet. App. 8a.

Petitioners' assertion that *Riley*, 487 U.S. 781, *Secretary of State of Md. v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984), and *Schaumburg*, 444 U.S. 620, demand a different outcome are misplaced. As explained by the Fourth Circuit, those "cases are, quite frankly, horses of a different color." *National Fed'n of the Blind*, 420 F.3d at 343. Judge Wilkinson's explanation as to why that trilogy of cases does not dictate a different result is equally persuasive in this case. *Id.* at 343-45. "Those three cases, as the Supreme Court has subsequently explained, considered 'prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level.'" *Id.* at 343 (quoting *Illinois, ex rel Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003)). The Act, on the other hand, places no limitation on the amount of a telemarketer's fee, and is designed to protect residential privacy through content neutral place and manner restrictions.

The lower court's analysis is consistent with, and appropriately applies, the time, place, and manner precedent of this Court.

C. Petitioners' other arguments are not properly before the Court.

In an attempt to justify their demand for this Court's attention, Petitioners go beyond the scope of the arguments they made below, as well as the decision of the Eighth Circuit. Those arguments are not properly before the Court.

See Clingman, 125 S. Ct. at 2041-42; *Cooper Indus.*, 543 U.S. at 168-69.

1. The Act does not impermissibly mandate speech.

Although touched upon at page 17 of the Petition, the Eighth Circuit did not address, and Petitioners did not raise to the Eighth Circuit, whether the Act impermissibly mandates speech. Because this issue was not raised below or addressed by the Eighth Circuit, review is not warranted.[7]

In any event, *Riley* does not support Petitioners' position. N.D. Cent. Code 51-28-01(7)(c)(2), Pet. App. 28a, requires the caller disclose the caller's first and last name and the name, address, and telephone number of the organization. In *Riley*, however, the plaintiff did not challenge, and the Court did not address, a requirement that the caller disclose his or her name and the name of the organization. 487 U.S. at 786.

Also, under the *Riley* analysis, compelling disclosure of the caller's name and the name, address, and telephone number of the organization is constitutional. Such a disclosure would not "substantially burden" any protected speech. *Id.* at 798. In fact, accurately identifying the organization for which the call is being made can do nothing but help further the organization's mission. But even if the required disclosure did minimally burden speech, such burden is remote or incidental and does not raise First Amendment concerns. *Id.* at 799 n.11 (stating "nothing in this opinion should be taken to suggest that the State may not require a

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[7] Although this issue was raised at the district court, the district court also did not address it.

fundraiser to disclose unambiguously his or her professional status"); *see also Indiana Voluntary Firemen's Ass'n v. Pearson,* 700 F. Supp. 421, 442 (S.D. Ind. 1988).

Thus, even if the Eighth Circuit did address this issue, which it did not, a holding in favor of Respondent would not be inconsistent with *Riley*.

2. Maintenance of the registry is not properly before the Court.

The decision below also did not address Petitioners' assertion the Act lacks appropriate mechanisms to ensure telephone numbers on the list are accurate, or a procedure to remove telephone numbers from the list. Pet. 8. Equally fatal to review is the fact this concern challenges the implementation of the Act, which is not an appropriate argument in a facial challenge. *See Frisby*, 487 U.S. at 488; *Carter*, 2005 WL 2253601, at *10 n.13.

Moreover, the Act does take steps to ensure old numbers are removed from the lists. N.D. Cent. Code § 51-28-09(1)(b), Pet. App. 32a, provides that "notice given by a subscriber . . . is effective for five years unless revoked by the subscriber." Thus, a subscriber can remove the subscriber's number from the list, and a subscriber must periodically renew the subscriber's request to remain on the do-not-call list. Furthermore, the Attorney General has authority to "adopt rules governing the establishment, distribution, and operation of the do-not-call list." N.D. Cent. Code § 51-28-09(1), Pet. App. 31a. If, as the statute is implemented, concerns exist regarding individuals without authority placing numbers on the list or numbers not being

renewed on the list, the Attorney General can adopt rules addressing those issues.[8]

There is no reason, in the context of a facial challenge, to assume the Attorney General will allow invalid phone numbers to accumulate on the list. And even if a few unauthorized numbers are on the list, that would not provide a basis for invalidating the entire law. It would not represent the sort of "substantial overbreadth" necessary for facial invalidation. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (explaining that a "facial challenge will not succeed unless the statute is 'substantially' overbroad") (citation omitted); *New York v. Ferber*, 458 U.S. 747, 771 (1982) ("The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel."); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (stating "the overbreadth of a statute must not only be real, but substantial as well").

3. The Act does not favor commercial speech.

Also not properly before the Court is Petitioners' assertion the Act treats some commercial speech more favorably than charitable speech. Pet. 24. The lower court did not address this issue. Furthermore, Petitioners' assertion N.D. Cent. Code N.D.C.C. § 51-28-01(7)(b), the established business relationship exception, treats commercial speech more favorably than charitable speech is an "as applied" challenge, not appropriate in this facial challenge. Respondent has not

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[8] Indiana has promulgated regulations providing comprehensive procedures to compile and to maintain an accurate telephone-privacy list. *See* Ind. Admin. Code tit. 11, r. 2-2, *et seq.*

applied the established business relationship as interpreted by Petitioners.[9] If an actual case or controversy does ever arise regarding application of the established business relationship exception, North Dakota courts will resolve that case or controversy.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[9] Based upon North Dakota statutory law, Respondent interprets N.D. Cent. Code § 51-28-01(7)(b) to apply to charities and commercial entities alike. *See* N.D. Cent. Code § 51-15-01(3), (5).

(3)

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IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE; VETERANS OF FOREIGN WARS, DEPARTMENT OF NORTH DAKOTA,
Petitioners,

v.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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STATUTES

North Dakota Cent. Code Chapter 51-28-01 *et seq.* 1

Pursuant to Supreme Court Rule 15, Petitioners Fraternal Order of Police, North Dakota State Lodge; Veterans of Foreign Wars, Department of North Dakota ("Petitioners") respectfully submit this Reply Brief in Support of the Petition for a Writ of Certiorari (the "Petition") and (A) request that the Court consider the Petition concurrently with the "Petition for a Writ of Certiorari" filed in the matter entitled *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (2005), Case No. 05-927; and (B) address matters newly raised in the "Brief in Opposition" (the "Opposition") filed on behalf of Wayne Stenehjem, in his official capacity as Attorney General of the State of North Dakota ("Respondent").

ARGUMENT

A. The Court Should Consider this Petition Concurrently with the Petition for a Writ of Certiorari Regarding *National Federation of the Blind.*

This case and *National Federation of the Blind* present similar questions regarding the constitutionality of *charitable speech restrictions that apply to charities using professional fundraisers, but do not apply to charities using staff or volunteer fundraisers*. Petitioners request that the Petitions be considered together, and that review be granted in both cases.

In this case, the Eighth Circuit has upheld North Dakota Cent. Code Chapter 51-28-01 et seq. (the "Act") extending the national do-not-call registry (the "National Registry") to charities using professional fundraisers in North Dakota.[1]

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[1] While this challenge is a "facial challenge," it is important to consider that the Act effectively bans telephone solicitations by charities that are unable to afford in-house fundraisers. Charities that cannot afford their own fundraising staff certainly cannot afford to purchase the equipment or pay the fees necessary to maintain the National Registry. Even now, the FTC is seeking to increase the fees for the National Registry. *See* www.

The Act does not apply the National Registry to charities using staff or volunteer fundraisers.

The National Registry is maintained by the Federal Trade Commission (the "FTC") and the Federal Communications Commission (the "FCC"). The FTC and FCC do not impose the National Registry on *any* charitable calls, including calls made by professional fundraisers. The FTC imposes other burdens selectively on charities using professional fundraisers, however, including an entity specific do-not-call provision (requiring the charities to maintain a record of all persons called who request not to be called again), calling time restrictions, a requirement that telefunders transmit caller-ID information and promptly identify the call as a solicitation, and a prohibition on abandoned calls. These restrictions were upheld by the Fourth Circuit in *National Federation of the Blind*.

Both this decision and the decision in *National Federation of the Blind* impose expensive—prohibitively expensive—burdens on the speech of charities that already are so poor that they cannot afford to hire their own fundraising staff, and are forced to turn to professional fundraisers. On their face, these burdens are unconstitutional under the First and Fourteenth Amendments.

B. Petitioners Contend the Act is Unconstitutional; Not Preempted.

In the Opposition, Respondent concedes that: ". . . neither the FCC nor the FTC prohibits telemarketing calls on behalf of charities to all federally-registered telephone subscribers" and "North Dakota does not maintain a separate state registry; it merely enforces its substantive no-call law for the benefit of North Dakota residents *who have registered for the federal*

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ftc.gov/os/2006/04/P034305TSRFeesNPRandRequestforPublicCommentFRNotice.pdf.

list. . . ." (Opposition, p. 7-8.) These concessions prove Petitioners' point—that North Dakota is selectively extending the National Registry to charitable speech by charities employing professional fundraisers.

Respondent seeks to deflect this challenge by mischaracterizing Petitioners' argument as a preemption argument, and arguing that the substantive regulations of the FTC and FCC cannot *preempt* North Dakota's ability to regulate telephone solicitations. (Opposition, p. 5-7.) However, Petitioners are not arguing preemption or seeking to preclude North Dakota from regulating telephone solicitations. Instead, Petitioners contend that North Dakota is attempting to do what the FTC, FCC, and Tenth and Fourth Circuits have suggested cannot be done within the bounds of the United States Constitution.

As noted in the Petition, the FTC and FCC exempt charitable calls from the National Registry in recognition of the potential constitutional violations that would result from its application. The Tenth and Fourth Circuit Courts of Appeal have sanctioned this exemption. *See Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) cert. denied, 543 U.S. 812 (2004) (upholding the application of the national do-not-call restrictions to commercial speech only, and noting the exemption of charitable calls); and *National Federation of the Blind*, 420 F.3d 331 (upholding the application of company-specific call restrictions to charitable solicitation by professional fundraisers). Thus, Petitioners do not argue that the Act is preempted, but that it is unconstitutional, and cite in support the agencies that are charged with applying the National Registry and the Courts of Appeal that have reviewed their decisions.

In the Opposition, Respondent attempts to refute Petitioner's constitutional argument by claiming that the extension is content-neutral, narrowly tailored and justified by the privacy invasions caused by *commercial* telemarketing. Respondent's arguments lack merit.

1. The Act is Content-Based; Not Content Neutral.

In the Opposition, Respondent argues that the Act is content-neutral because it targets calls by charities employing professional fundraisers based on the Legislature's judgment that these charities are able to generate a greater "sheer volume" of calls than charities using staff and volunteer fundraisers. Opposition, p. 13.

The First Amendment is intended to protect and promote speech. *See* U.S. Constitution, First Amendment ("Congress shall make no law . . . abridging the freedom of speech. . . .") Under the First Amendment, "more speech" is not an evil to be remedied; it is a constitutional value to be protected. The Act is not an attempt to regulate speech to serve a legitimate governmental interest; it is simply an attempt to lessen the "sheer volume" of speech by banning it.

Further, Respondent's argument that charities using professional fundraisers generate more calls is speculative and without any evidentiary support. If charities using professional fundraisers were so successful, they would quickly generate the funds necessary to hire fundraising staff in order to avoid the high fees charged by professional fundraisers. Like the FTC's assertion in *National Federation of the Blind* that professional fundraisers are more likely to engage in "more abusive and coercive telemarketing" than staff or a volunteer, Respondent's argument fails for want of factual support. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993) (holding that it is the government's burden to establish a reasonable fit between its legitimate interests and regulation of speech); and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (holding that "anecdotal evidence" failed to satisfy the government's burden in regulating speech).

Speech regulation is content-based if it requires the government to review the content of speech in order to apply the regulation. In *Rowan v. United States Post Office*, 397 U.S.

728 (1970), for example, the Court upheld a statute allowing a resident to instruct the Post Master General to stop unwanted mailings. The Court construed the statute as vesting discretion over the characterization of the subject mailings with the resident, instead of the Postmaster General, in order "to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official." *Id.* at 744. The Court noted that the statute could not vest power in a government official to determine "whether the materials were 'similar' or 'possessing touting or pandering characteristics" because that would engage the government in "an evaluation suspiciously like censorship." *Id.* at 735.

The Act is content-based because it requires the government to review of the content of a charitable solicitation in order to determine whether the Act has been violated—contrary to *Rowan.* "The Act defines 'telephone solicitation' as 'any voice communication over a telephone line for the purpose of *encouraging charitable contributions. . . .*'" Opposition, p. 1. This definition *requires* the government to review the content of a solicitation to determine whether it is made to "encourage charitable contributions," as opposed to being made to "educate" the recipient of the call about the charity's activities.

The content-based nature of the Act is exacerbated because it grants the government discretion to determine that a call violates the Act even if it does not *explicitly* encourage solicitation. Calls violate the Act if they are made "*for the purpose*" of encouraging charitable contributions, even if they do not expressly request a donation. There are no guidelines or limitations on how the government is to determine the charity's subjective intent in making the call, however. Therefore, the Act is unconstitutional for the additional reason that it confers discretionary authority in the government. *See Cantwell v. State of Connecticut,* 310 U.S. 296, 307 (1940) (holding that "to condition the solicitation of aid for

the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.").

Based upon the foregoing, and contrary to Respondent's arguments in Opposition, the Act is content-based.

2. The Act is Not "Narrowly Tailored."

In the Opposition, Respondent argues that the courts below properly found that the Act is "narrowly tailored" and therefore constitutional, in that:

> "The lower court noted the Act only 'prohibits calls to the homes of residents ***who have chosen*** not to receive calls from professional charitable solicitors." (Opposition, p. 20, emphasis added.)
>
> ". . . the Eighth Circuit properly found the Act, which applies to residential subscribers only and permits individual subscribers ***to decide*** whether to prohibit calls, is narrowly tailored. Due to the ***opt-in nature of the Act***, the Act eliminates only those phone calls that citizens themselves ***expressly do not want to receive***. Individual subscribers, not the government, ***decide*** whether and which calls are unwanted and disrupt residential privacy. The Act implements each subscriber's ***decision***, and leaves room for the subscriber to modify what calls are banned so only unwanted calls are eliminated." (*Id.*, pp. 19-20, emphasis added.)

In support of this argument, Respondent cites to *Rowan*, 397 U.S. 728, and argues that the Act permits the resident to decide whether to stop charitable solicitations by signing up on the National Registry.[2] However, in *Rowan*, the residents

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[2] *Rowan* is inapplicable to this case, because it (a) involved purely commercial speech; whereas this case involves charitable speech; (b) upheld an "opt-in" that enabled a resident to prohibit *an identified com-*

knew what they were signing up for. North Dakota residents signing up for the National Registry do ***not*** knowingly "choose" or "decide on" its application to charities at all, much less its limited application to solicitations by charities using professional fundraisers. The FTC and FCC do not apply the National Registry to *any* charitable calls. Individuals signing up for the National Registry are expressly told that the National Registry ***does not apply to charitable speech***.[3] Consequently, North Dakota residents signing up for the National Registry cannot be said to have "*chosen*" or "*decided*" not to receive calls from charities using professional fundraisers. In fact, the Act prevents residents who welcome charitable calls from receiving charitable calls from poorer charities using professional fundraisers, if they have signed up with the National Registry to avoid commercial telemarketers. It is the State—not the individual resident—that has decided to stop charitable calls through the National Registry.

In support of its narrowly tailored argument, Respondent also cites to *National Federation of the Blind* (upholding the

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mercial mailer from continuing to send mail solicitations to him, similar to the FTC's company-specific do-not-call prohibition; whereas this case involves a blanket prohibition on any calls by professional fundraisers; and (c) the statute in *Rowen* had been amended to ensure that the government did not participate in any content review; whereas the Act requires content review by the government to determine whether the solicitation is made "for the purpose of encouraging" charitable contributions.

[3] In fact, the FTC's current web-site (www.donotcall.gov) expressly represents that the national do-not-call registry does *not* apply to charitable calls. It states, in part: "30. Are calls from political organizations *or calls soliciting for charities* covered? . . . *Charities are not covered by the requirements of the national registry*. However, if a third-party telemarketer is calling on behalf of a charity, a consumer may ask not to receive any more calls from, or on behalf of, that specific charity. If a third-party telemarketer calls again on behalf of that charity, the telemarketer may be subject to a fine of up to $11,000." (Emphasis added.)

FTC's company-specific do-not-call list on the ground that the company-specific approach is "narrowly tailored" compared to the National Registry); *Mainstream Marketing* (upholding the application of the National Registry to *core commercial* speech), and *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (upholding a prohibition on the use of automatic-dialing and announcing devices). These authorities similarly fail to support Respondent's "opt-in" argument because, again, there is no evidence that North Dakota residents knowingly "opt-in" to the application of the National Registry to charitable solicitation by charities using professional fundraisers.

3. The Regulation of the Speech of Charities Using Professional Fundraisers Cannot be Justified by Privacy Intrusions Caused by Commercial Telemarketing.

Respondent's agrument boils down to one simple proposition: Any ban on any type of telephone solicitation is good, hence constitutional, because it furthers the government's interest in protecting the privacy of the home. The Eight Circuit adopted this "big picture" definition of the problem, stating: "In the case before us, the overall problem is the intrusion on residential privacy caused by unwanted telephone solicitation." *See Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 598 (8th Cir. 2005); Pet. Appx., p. 6a, emphasis added. The Eight Circuit relied upon the North Dakota Legislature's "judgment" that less speech is better, stating: "In this facial challenge, we are reluctant to second-guess the North Dakota Legislature's *judgment* that professional charitable solicitors intrude more regularly on residents' privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions." *Id.*, 431 F.3d at 598; Pet Appx., p. 5a, emphasis added.

In the Opposition, Respondent claims that the North Dakota Legislature's "judgment" that the National Registry

should be selectively applied to charities using professional fundraisers was based on "factual findings of other entities" regarding privacy intrusions caused by ***commercial telemarketing***. *See* Opposition, p. 17, n. 5, citing *National Federation of the Blind v. Pryor*, 258 F.3d 851, 856 (2001) (referring broadly to "unwanted telephone solicitations" of all types, including commercial solicitations); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (referring to the use of automatic telephone dialing-announcing devices for all types of calls, including commercial and political calls); *State by Humphrey v. Casino Mktg. Group, Inc.*, 492 N.W.2d 882, 888 (Minn. 1992) (referring to commercial solicitations by automatic dialing—announcing devices); and *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J.Super.Ct. Law. Div. 1995) (referring to commercial speech).

While it is not clear whether the North Dakota Legislature actually considered these authorities as justifying the extension of the National Registry to charitable speech, if it did, there is even more reason to find the Act unconstitutional. If it relied on these authorities, the North Dakota Legislature lacked evidence that (a) charities using professional fundraisers made any invasive calls to North Dakota residents; (b) there was a "sheer volume" of such calls; and (c) residents considered such calls to be more intrusive than calls by charities using fundraising staff or volunteers. Under the First and Fourteenth Amendments, a selective ban on the speech of charities cannot be justified by privacy intrusions caused by commercial telemarketing.

C. Respondent Fails to Address the Act's Violation of Equal Protection.

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Act violates the equal protection clause of the Fourteenth Amendment by discriminating among similarly situ-